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No. 03-737

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAJOR GENERAL JAMES H. LIPSCOMB III, IN HIS OFFICIAL CAPACITIES AS THE ADJUTANT GENERAL OF THE STATE OF MISSISSIPPI, OF THE MISSISSIPPI MILITIA, OF THE MISSISSIPPI NATIONAL GUARD, AND AS EXECUTIVE HEAD OF THE MISSISSIPPI MILITARY DEPARTMENT AND THE MISSISSIPPI MILITIA, THE MISSISSIPPI NATIONAL GUARD and THE MISSISSIPPI MILITARY DEPARTMENT,

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, NANCY SPEIGHT, IN HER OFFICIAL CAPACITY AS REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION AND LINDA J. NORWOOD, IN HER FORMER OFFICIAL CAPACITY AS ACTING REGIONAL DIRECTOR OF THE FEDERAL LABOR RELATIONS AUTHORITY, ATLANTA REGION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL GUARD ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Federal Labor Relations Authority has the power to order state National Guards and their state Adjutants General* to participate in federal union representation elections concerning Guard personnel.

Whether the valuable Tenth and Eleventh Amendment rights of a state official and a state agency may be trumped by federal statute, when Congress lacks the constitutional authority to pierce those immunities with its Article I powers.

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* As explained by Petitioners, Adjutants General are the senior military commander of each state's National Guard. They are the National Guard analogue to the Chairman of the Joint Chiefs of Staff in the federal military.

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BRIEF OF THE NATIONAL GUARD ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

This Amicus Curiae Brief is filed by the National Guard Association of the United States, or NGAUS, an organization that strives to enhance the readiness of each state's National Guard and to ensure that they meet their essential goal as full partners in the conventional forces defending our Nation. NGAUS was created in 1878 to provide united National Guard representation before Congress. In the first constructive meeting of officers from the North and South after Reconstruction, the organizational meeting of NGAUS had the goal of obtaining better equipment, standardized training, and a more combat-ready force by petitioning Congress for resources. Today, well over a century later, NGAUS has the same mission.

According to its by-laws, the purpose of NGAUS is "to promote the national security of the United States of America." NGAUS is comprised of commissioned officers and warrant officers of each state and territory's Army and Air National Guard who are concerned about the role of the Guard, as well as a continuation of a strong militia in the Total Force construct. One key part of achieving this goal includes striving to ensure the successful continuation through promotion of the unique, historic dual federal and

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[1] Pursuant to Supreme Court Rule 37.2(a), NGAUS states that the Parties to this appeal have consented to the filing of this amicus brief. Pursuant to Supreme Court Rule 37.6, NGAUS states that counsel for Petitioners did assist NGAUS' counsel in the preparation of this brief, and that no person or entity other than NGAUS made any monetary contribution to the preparation or submission of this brief.

state missions of each state and territory's Guard, so to further their goals and mission.

NGAUS has participated in litigation when it believed that a national interest is was stake or that the issue of states' rights was at risk. In the big picture, this means ensuring that the line of demarcation between federal and state power does not become blurred or worse, progressively inched further toward federal domination. This delicate balance of power is threatened by the decisions below in this case in a way that directly affects the goals and purposes of the NGAUS.

SUMMARY OF ARGUMENT

This case presents an issue of national importance, whether the FLRA has the power to order state National Guards and their state Adjutants General to participate in federal union representation elections concerning Guard Technician personnel. The resolution of this question has an importance far exceeding the impact of potential unionization on a certain class of Guard personnel.

First, in order to answer the question in the affirmative, the Fifth Circuit and district court below had to find that state Guards and their Adjutants General act in a federal capacity, even though in a state command status, when administering Guard Technicians. This finding threatens the carefully crafted state/federal Guard balance, in a manner detrimental to our federal system and contrary to this Court's holding in *Perpich v. DOD*, 496 U.S. 334, 345 (1990).

Second, the decisions below will, as suggested by Petitioners, have unintended and negative national security consequences. The Fifth Circuit's holding that a state Guard in a state command status can be a federal agency and part of the National Guard of the United States—a separate entity that is a federal reserve component—threatens to criminalize the use of the each state's Guard for counterterrorism and

domestic law enforcement operations under the *Posse Comitatus* Act, 18 U.S.C. § 1385, at a time when this Nation is at war. NGAUS respectfully submits that this result, while surely unintended by the Court of Appeals below, is alone sufficient cause for the grant of a writ of certiorari in this case.

ARGUMENT

NGAUS adopts and reasserts the arguments offered by Petitioners, but would supplement and emphasize those as follows:

I. THIS COURT SHOULD GRANT THE WRIT TO UNDO THE HARM TO OUR CAREFULLY CRAFTED FEDERAL SYSTEM CAUSED BY THE FIFTH CIRCUIT'S FINDING THAT A STATE ADJUTANT GENERAL AND STATE NATIONAL GUARD CAN BE FEDERAL EXECUTIVE AGENCIES WHILE IN A STATE COMMAND STATUS.

The Fifth Circuit's decision in this case misapplied the carefully crafted Congressional and constitutional scheme delineating the respective spheres of each state's National Guard and the federal government. Ignoring *Perpich v. DOD*, 496 U.S. 334, 345 (1990), as well as the National Guard statutory scheme, the Fifth Circuit found that the Mississippi Guard and its Adjutant General are federal/state "hybrids"—a finding that infects the entire decision and allowed the court below to avoid addressing the major constitutional issues at stake.

Mississippi, as well as every state in the Union, has a state militia. The Mississippi Militia, of which Petitioner the Mississippi Guard is a subset, is composed of the "[n]ational guard, the Mississippi State Guard, and the unorganized militia." Miss. Code Ann. § 33-5-1. Pursuant to Miss. Code

Ann. § 33-1-1(d) the "Mississippi National Guard [means] that part of the organized militia of this state which is organized, equipped and federally recognized under the provisions of the laws of the United States and of the State of Mississippi relating to the National Guard." *Id.*

The Governor of Mississippi, not the President of the United States, is the Commander in Chief of the Mississippi National Guard (unless impressed into federal service). Miss. Code Ann. § 33-3-1; Miss. Const. art. V, § 119. This is because, unless called forth by the President under federal law, the respective states' National Guards are state militias, not federal military entities. *Perpich v. DOD*, 496 U.S. 334, 350-51 (1990) (recognizing that the militias are state entities).

The concept of the state militias pre-dates even that of the United States or its Constitution. Further, the Founding Fathers recognized the need for a militia and addressed it in Article I, Section 8 of the Constitution, which provides:

> The Congress shall have power. . . . ;
>
> (15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> (16) To provide for organizing, arming, and disciplining the Militia, and for governing such Part of that as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. Const., art. I, § 8, cls. 15 & 16.

The records of the Constitutional Convention indicate that the Founding Fathers were much concerned about the balance of federal versus state power in the Union and wanted to ensure that the states retained appropriate control over their militias. After much debate, the majority of the drafters decided that the federal government should not have complete

power over militia matters and appropriately reserved certain control to the states. Thus, in striking a balance between local and national control, the Constitution provides for a militia with dual control, alternating between federal and state, under particular circumstances. *The Militia Clauses, A National Guard, Federalism: A Constitutional Tug Of War*, 57 George Washington Law Review 3-28, 3-32 (Dec., 1988)(quoting the *Records of the Federal Convention of 1787*, at 293 M.(Farrand Ed. 1911)).

The dual control concept has continued unabated to this day. Yet Congress has over the years modified the statutory scheme governing the Guard, so as to streamline its use by the Nation in times of war or crisis.

For example, following certain problems associated with the Spanish-American War, Congress enacted statutory amendments which were known as the Dick Act, of January 21, 1903, 32 Stat.775, in which Congress exercised its power to organize the militia. The Dick Act provided for an organized militia to be known as the "National Guard" which would conform to a regular army organization, be equipped through federal funds, and be trained by regular army instructors. *Perpich*, 496 U.S. at 342.

In 1918, a provision of the National Defense Act which allowed the federal government to draft Guardsmen for overseas assignments was upheld in the *Selective Draft Law Cases*, 245 U.S. 366, 368 (1918). In these cases, certain members of the National Guard challenged the provision of the National Defense Act which allowed the President to draft individuals for service overseas. In its opinion, this Court reasoned that the Militia Clauses were not to be read as a limitation on Congress' general war clause power. Importantly, the National Defense Act as interpreted by this Court anticipated the concept which would be later known as the "dual nature of the guard."

In 1933, Congress created a new and separate federal entity, to be known as the National Guard of the United States. *Perpich*, 496 U.S. at 345. To expand federal authority for activation of individual Guardsmen, and to remove lingering doubts about the constitutionality of Guard deployments overseas, each Guardsman on induction was now required to assume dual statuses. That is, every Guardsman was to be a potential[2] federal reservist as well as a member of their state's militia. *Id.* at 345-46.

The modern dual status Guard system was codified in 1952 in the Armed Forces Reserve Act. Pub. L. 82-476, 66 Stat. 481 (1952), which provided that Guardsmen could be called out by the President for fifteen days each year for any reason, subject to the consent of their governor. The requirement for gubernatorial consent was contested in later years as the role of the Guard expanded, particularly in an area of overseas operations which were removed from the continental United States. As a result certain governors refused to allow their National Guard units to participate in certain overseas operations. In response to these local restrictions, the Montgomery Amendment of 1986, Pub. L. 99-661 § 522, 100 Stat. 3(A)16. (1986) (codified at 10 U.S.C. § 672 (f) Sub 4 (1986)), was enacted, removing the requirement of gubernatorial consent for federal training by the National Guard. *Perpich*, 496 U.S. at 346.

A dispute over the constitutionality of the Montgomery Amendment came to a head in *Perpich v. DOD*, 496 U.S. 334

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[2] While all Guardsmen are required to also enlist in the separate federal reserve component entity - the National Guard of the United States - federal law does not require them to maintain that membership in order to remain a member of their state's Guard. Thus, there are Guardsmen who do not hold "federal recognition," yet remain members of their state's Guard. *E.g., Zitser v. Walsh*, 352 F. Supp. 438, 440 (D. Conn. 1972) ("One may be a member of the National Guard of a state without receiving federal recognition, but never the reverse").

(1990). In *Perpich*, the Department of Defense had ordered several state National Guard units to serve on active duty in Central America. Some state governors opposed these out-of-country federal missions and refused to consent to the deployments. As the Montgomery Amendment negated the effect of the governors' veto and allowed the deployment of Guard personnel overseas, Governor Perpich of Minnesota sued the Department of Defense alleging that it could not deploy the Minnesota guardsmen without gubernatorial consent. In a unanimous decision, this Court upheld the constitutionality of the Montgomery Amendment.

Perpich is key to the instant case, not because of its holding on gubernatorial consent, but because it carefully explained and delineated the state versus federal status of the Guard, as well as Guardsmen. *Perpich* makes it clear that National Guardsmen are now members of two legally distinct and separate organizations—their state's Guard and the separate National Guard of the United States, a federal reserve component. *Id.* at 347 & 347 n.19. This dual system requires state National Guard members to simultaneously enroll in their state's militia as well as the National Guard of the United States. 10 U.S.C. §101 (11) & (13).

The implication of this dual system is the key to this case; it means that each member of the National Guard of the United States when on federal active duty is relieved from duty in the National Guard of his state from the effective date of the federal duty order, and remains a federal soldier until the individual is relieved from that duty. At the time the individual is relieved from federal duty, he or she reverts back to the membership in the state Guard unit. 32 U.S.C. § 325(a).

Most importantly, however, *unless and until* ordered to active duty in the Army or Air Force, National Guard members retain their state status as members of their separate state Guard unit. *Perpich,* 496 U.S. at 345. As Justice

Stevens explained, Guardsmen "[n]ow must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—*only one of which is worn at any particular time.*" *Id.* at 348 (emphasis added). This is "dual" status, not "hybrid" status.

In sum, as this Court has previously found, unless federalized, Guardsmen serve in their state capacity as state militiamen:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States makes it apparent that military members of the Guard are employees of the States. . . .

Maryland ex rel. Levin v. United States, 381 U.S. 41, 48 (1965), *vacated on other grounds*, 382 U.S. 159 (1965). Likewise, each state's Guard is itself a state agency. *E.g.*, *Jones v. New York State Div. of Military Affairs*, 166 F. 3d 45, 49 (2d Cir. 1999) (New York Guard is state entity); *Hefley v. Textron, Inc.*, 713 F. 2d 1487, 1493 (10th Cir. 1983) (Guard "[i]s an arm of the state and entitled to any immunity which the state possesses. . .").

Guardsmen can also be impressed by the President directly into federal service. *E.g.*, 10 U.S.C. §§ 331-333 & 12406 (authorizing executive officials to call forth the militia of the States). Finally, they can be mobilized to active duty in the federal military through their membership in the separate federal reserve component, the National Guard of the United States. *Perpich*, 496 U.S. at 350 n.21 (recognizing that "Congress has by different statutes provided for activating the National Guard of the United States and for calling forth the militia, including the National Guards of the various States").

Thus, the above discussed Titles 10 and 32 Guard statutory scheme, as well as *Perpich*, make it clear that an Adjutant General and a state Guard's status at any given time is a function of who has command authority, a governor or the President. This is because, in the context of the Guard, whether one is in a state or federal status "[d]epends ***solely*** on whether command of the Guardsman has been taken away from a state's governor by one authorized to do so by Congress." *United States v. Hutchings*, 127 F. 3d 1255, 1258-59 (10th Cir. 1997). (emphasis added); *accord Gilbert v. United States*, 165 F. 3d 470, 473 (6th Cir. 1999) (quoting B. Rich, *The National Guard and Posse Comitatus*" 1994 Army Law 16, 19 ("'[t]he issue of status depends on command and control and not on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof'")).

Here, the Fifth Circuit's finding that the Adjutant General and the Mississippi Guard are "hybrids" that can simultaneously hold both a state and federal status, is directly contrary to the holding of *Perpich*, 496 U.S. 345-46, that Guardsmen cannot—as a matter of law—wear a state and a federal hat *at the same time*. This mutually exclusive duality is important, because, as pointed out by Petitioners, the state status of nonfederalized Guardsmen is a "[c]onstitutional aspect" of their service. *Perpich*, 496 U.S. at 349.

The Fifth Circuit's decision in this case threatens this carefully crafted Congressional and constitutional scheme delineating the respective spheres of state versus federal military power. It also runs contrary to the Founding Father's vision for dual control of the militia.

Simply put, it is very important—both as a matter of Federalism, as well as the interworkings of the Guard and the Active Components—that the demarcation line of authority between the federal military and each state's militia be

maintained. For this reason, NGAUS respectfully submits that a writ of certiorari should be granted to review and overturn the decision below, which mistakenly conflated the mutually exclusive state versus federal statuses of each state's Guard and Adjutant General.

II. THIS COURT SHOULD GRANT THE WRIT TO PREVENT HARM TO NATIONAL SECURITY CAUSED BY THE POTENTIAL INTERACTION OF THE DECISION BELOW AND THE *POSSE COMITATUS* ACT.

If left undisturbed, the Fifth Circuit's decision will harm national security. It should go without saying that this Nation is at war on multiple fronts. Not only are American troops fighting in Afghanistan and Iraq, the War on Terrorism has tragically reached our own soil. In this post-9/11 world, each state's National Guard is playing a critical role in this War.

This fact is important, because generally speaking, the *Posse Comitatus* Act prohibits the use of "[a]ny *part* of the [federal] Army or Air Force as a posse comitatus or otherwise to execute the laws. . ." 18 U.S.C. § 1385 (emphasis added). For this reason, with some limited exceptions, federal troops cannot be used in certain types of domestic operations.

However, under the *Posse Comitatus* Act, it has long been accepted that the Guard—because it is not a *part* of the federal military—is not prohibited from engaging in domestic operations. Recognizing that, since 9/11 thousands of Guardsmen across the Nation have engaged in critical counterterrorism and law enforcement operations, while in a state status. For example, and as pointed out by Petitioners, in the post-9/11 period, Guardsmen were detailed as security at airports nationwide. Further, many states have used Guardsmen to protect nuclear and other key infrastructure facilities from terrorist attack. Importantly, these Guardsmen have served these missions in a state status—as members of

their respective states' Guards—so as not to violate the *Posse Comitatus* Act's prohibition on certain domestic operations by federal troops.

Here, the Fifth Circuit's holding that a state National Guard is a federal agency and part of the National Guard of the United States, threatens to criminalize the use of the states' Guards for these and certain other domestic operations. This is because under 10 U.S.C. § 3062(c), the National Guard of the United States is indisputably part of the Army.

Thus, if the Fifth Circuit's finding that the states' National Guards are a subpart of National Guard of the United States stands, some may well contend that use of state National Guards for certain domestic counterterrorism and law enforcement operations is a felony. *See Clark v. United States*, 322 F.3d 1358, 1367 (Fed. Cir. 2003) ("To include a National Guard member in a reserve component ...when he is in service to the state National Guard would be to treat that member as a federal employee, and not as a state serviceman, and would be contrary to [Posse Comitatus]").

Such a result, especially with this Nation at war on our own soil, would seriously damage national security. NGAUS respectfully submits that avoidance of this result alone justifies the grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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